BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether appellants lack standing under Article III to seek application of the Federal Advisory Committee Act ("FACA") to the ABA Standing Committee on the Federal Judiciary's ("ABA Committee's") process of assessing qualifications of the President's potential nominees to the federal judiciary.

2. Whether, absent a "clear statement" of congressional intent, FACA should be construed to apply to an independent, private organization which provides the President its evaluation of the qualifications of potential nominees to the federal judiciary, where the process for selecting and nominating individuals to the federal bench is reserved exclusively to the Executive Branch under Article II of the Constitution.

3. Whether the application of FACA to the ABA Committee in a way that interferes with the President's process of selecting and nominating individuals to the federal judiciary violates the Appointments Clause of Article II of the Constitution.

4. Whether the application of FACA to the members of the ABA Committee impermissibly infringes their First Amendment freedoms of speech and association, while failing to serve any compelling governmental interest that could not be satisfied by less intrusive means.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT	1
A. The Federal Judicial Appointment Process And The ABA Standing Committee On Federal Judiciary	1
B. The Federal Advisory Committee Act	5
C. The Proceedings Below	5
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. APPELLANTS LACK STANDING TO ASSERT THE GENERALIZED GRIEVANCES ADVANCED IN THEIR COMPLAINTS	12
A. Appellants Have Suffered No Injury In Fact As Required By Article III	13
B. There Is No Discernible Relationship Between The Injury Asserted By Appellants And Any Relief They Could Receive In This Case	15
II. CONGRESS DID NOT INTEND FACA TO APPLY TO THE EXECUTIVE BRANCH'S USE OF ADVICE FROM PRIVATE ORGANIZATIONS CONCERNING PRESIDENTIAL APPOINTMENTS	18
A. The District Court's Overly Literal Interpretation Of FACA Is Contrary To The Applicable Rules Of Statutory Construction	18

TABLE OF CONTENTS—Continued

Page

B. Congress Did Not Intend FACA To Apply To Organizations Such As The ABA Committee 21

III. APPLICATION OF FACA TO THE PRESIDENT'S AND JUSTICE DEPARTMENT'S USE OF THE ABA COMMITTEE WOULD VIOLATE THE APPOINTMENTS CLAUSE.. 26

A. The President Has Exclusive Constitutional Authority To Nominate Persons To The Federal Judiciary 27

B. FACA Impermissibly Limits And Interferes With The Authority Of The President Under The Appointments Clause To Nominate Candidates To The Federal Bench 34

IV. APPLICATION OF FACA IN THIS CASE WOULD VIOLATE THE FIRST AMENDMENT 40

A. Application Of FACA Would Give Rise To A Direct Infringement Of Rights To Freedom Of Association And Expression 40

B. The Governmental Interests Served By FACA Cannot Justify The Substantial Infringement Of First Amendment Rights That Would Result From Application Of The Act To The ABA Committee 46

CONCLUSION 49

TABLE OF AUTHORITIES

Cases Page

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977) 41
Allen v. *Wright*, 468 U.S. 737 (1984) 14, 15, 17
Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940) .. 19
Baumgarten v. *Koch*, 97 Misc. 2d 449, 411 N.Y.S.2d 487 (N.Y. 1978) 36
Board of Directors of Rotary Club Int'l v. *Rotary Club of Duarte*, 107 S.Ct. 1940 (1987) 40
Bowen v. *American Hospital Ass'n*, 476 U.S. 610 (1986) 10, 19
Bowsher v. *Synar*, 478 U.S. 714 (1986) 34
Bredice v. *Doctors Hospital*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1971) 42
Brown v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) 40, 42
Buckley v. *Valeo*, 424 U.S. 1 (1976) 30, 33, 34
Cannon v. *University of Chicago*, 441 U.S. 667 (1979) 15
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 43
Center for Auto Safety v. *Cox*, 580 F.2d 689 (D.C. Cir. 1978) 44
Center for Auto Safety v. *Department of Justice*, 576 F. Supp. 739 (D.D.C. 1983) 39
Church of the Holy Trinity v. *United States*, 143 U.S. 457 (1892) 19
Clark v. *Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984) 43
Cort v. *Ash*, 422 U.S. 66 (1975) 15
Cousins v. *Wigoda*, 419 U.S. 477 (1975) 40
Crowell v. *Benson*, 285 U.S. 22 (1932) 20
Diamond v. *Charles*, 476 U.S. 54 (1986) 13, 15
Donovan v. *Crisostomo*, 689 F.2d 869 (9th Cir. 1982) 43
Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) 14
Dun & Bradstreet v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) 41

TABLE OF AUTHORITIES—Continued

	Page
Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)	41
EEOC v. *University of Notre Dame*, 715 F.2d 331 (7th Cir. 1983)	42
Elrod v. *Burns*, 427 U.S. 347 (1976)	44
Federal Election Commission v. *Lance*, 617 F.2d 365 (5th Cir. 1980)	43
Federal Election Commission v. *Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981)	47
First National of Boston v. *Bellotti*, 435 U.S. 765 (1978)	46
FTC v. *Bunte Brothers*, 312 U.S. 349 (1941)	19
Gates v. *Schlesinger*, 366 F. Supp. 797 (D.D.C. 1973)	38
Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979)	13, 14
Healy v. *James*, 408 U.S. 169 (1972)	45
Heckler v. *Mathews*, 465 U.S. 728 (1984)	13, 15
Hormel v. *Helvering*, 312 U.S. 552 (1941)	43
INS v. *Chadha*, 462 U.S. 919 (1983)	34
J.E. Riley Investment Co. v. *Commissioner of Internal Revenue*, 311 U.S. 55 (1940)	43
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973)	17
McDonald v. *Smith*, 472 U.S. 479 (1985)	41
Meese v. *Keene*, 107 S.Ct. 1862 (1987)	13, 15
Mills v. *Alabama*, 384 U.S. 214 (1966)	41
Minnesota Board for Community Colleges v. *Knight*, 465 U.S. 271 (1984)	45
Mistretta v. *United States*, 109 S.Ct. 647 (1989)	33
Morrison v. *Olson*, 108 S.Ct. 2597 (1988)	28, 29, 33
Mosk v. *Superior Court*, 25 Cal.3d. 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979)	36, 42
Myers v. *United States*, 272 U.S. 52 (1926)	28, 33, 34
NAACP v. *Alabama*, 357 U.S. 449 (1958)	40
NAACP v. *Button*, 371 U.S. 415 (1963)	46

TABLE OF AUTHORITIES—Continued

	Page
Nader v. *Dunlop*, 370 F. Supp. 177 (D.D.C. 1973)	38
National Anti-Hunger Coalition v. *Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983)	21, 48
NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979)	20
National Treasury Employees Union v. *Reagan*, 663 F.2d 239 (D.C. Cir. 1981)	43
Natural Resources Defense Council, Inc. v. *Herrington*, 637 F. Supp. 116 (D.D.C. 1986)	24
Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977)	8, 39
People ex rel. Illinois Judicial Inquiry Board v. *Hartel*, 72 Ill. 2d 225, 380 N.E. 2d 801 (1978), *cert. denied*, 440 U.S. 915 (1979)	36
In re Petition of Illinois Judicial Inquiry Board, 128 Ill. App. 3d 798, 471 N.E.2d 601 (1984)	36, 42
Pickering v. *Board of Education*, 391 U.S. 563 (1968)	44
Roberts v. *United States Jaycees*, 468 U.S. 609 (1984)	40, 41, 43
Rouse v. *Judges of Circuit Court*, 609 F. Supp. 243 (N.D. Ill. 1985)	44
Schlesinger v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974)	14
Sherbert v. Verner, 374 U.S. 398 (1963)	46
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976)	*passim*
United Housing Foundation, Inc. v. *Forman*, 421 U.S. 837 (1975)	19
United States v. *American Trucking Ass'ns*, 310 U.S. 534 (1940)	19
United States v. *Bass*, 404 U.S. 336 (1971)	19
United States v. *Brown*, 333 U.S. 18 (1948)	19
United States v. *Bryan*, 339 U.S. 323 (1950)	19
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)	33, 34
United States v. *Nixon*, 418 U.S. 683 (1974)	37

TABLE OF AUTHORITIES—Continued

Page

Valley Forge Christian College v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982) 9, 12, 13, 14
Warth v. *Seldin*, 422 U.S. 490 (1975) ..... *passim*
Washington Legal Foundation v. *American Bar Association Standing Committee on the Federal Judiciary*, 648 F. Supp. 1353 (D.D.C. 1986) ..... *passim*
Zaustinsky v. *University of California*, 96 F.R.D. 622 (N.D. Cal. 1983) 42

Constitutional Provisions

U.S. Const. art. I ..... *passim*
U.S. Const. art. II, § 2 ..... *passim*
U.S. Const. art. III ..... *passim*

Statutes and Regulations

Freedom of Information Act, 5 U.S.C. § 552 ..... 5, 35
Government-in-the-Sunshine Act, 5 U.S.C. § 552 b(c) 5, 39, 41
Federal Advisory Committee Act, 5 U.S.C. App. II ..... *passim*
Omnibus Judgeships Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629, 28 U.S.C. § 133 ..... 25, 26
5 Stat. 533 23
35 Stat. 1027 23
58 Stat. 337 23
42 Fed. Reg. 61,445 (1977) 35

Legislative Materials

118 Cong. Rec. (1972) 21, 22, 23
124 Cong. Rec. (1978) 26
H.R. 4383, 92d Cong., 2d Sess. (1972) 21
S. 3529, 92d Cong., 2d Sess. (1972) 21
H.R. Rep. No. 858, 95th Cong., 2d Sess. (1978) 26
H.R. Rep. No. 1403, 92d Cong., 2d Sess. (1972) 22
H.R. Rep. No. 1441, 94th Cong., 2d Sess. (1976) 39
H.R. Rep. No. 1731, 91st Cong., 2d Sess. (1970) 23
S. Rep. No. 1098, 92d Cong., 2d Sess. (1972) 21, 22, 23

TABLE OF AUTHORITIES—Continued

Page

Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts and Other Documents*, 95th Cong., 2d Sess. (Comm. Print 1974) ..... *passim*

Nomination Hearings of Anthony M. Kennedy Before the Senate Comm. on the Judiciary, 100 Cong., 1st Sess. (Dec. 16, 1987) 2

Other Authorities

ABA, 71 Annual Report of the American Bar Association (1946) 1

ABA, 78 Annual Report of the American Bar Association (1953) 2

ABA, *Standing Committee on the Federal Judiciary: What It Is and How It Works* (1983) ..... *passim*

Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964) 40

The Federalist No. 76 (A. Hamilton) (Rossiter ed. 1961) 30-31, 32, 37

The Federalist No. 77 (A. Hamilton) (Rossiter ed. 1961) 31

4 *The Founders Constitution* (Kurland and Lerner, eds. 1987) 32

1 *Records of the Federal Convention of 1787* (M. Farrand ed. 1966) 29

2 *Records of the Federal Convention of 1787* (M. Farrand ed. 1966) 30

Report of the Committee on Judicial Selection, 10 A.B.A. J. 820 (1924) 1

Sixteenth Annual Report of the President on Federal Advisory Committees Fiscal Year 1987 (1988) 25

Story, *Commentaries on the Constitution* § 1529 (3d ed. 1858) 31

IX *Works of John Adams* (C.F. Adams ed. 1850—Report 1969—Books for Libraries Press) 32

Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* §§ 3531.5-3531.6 (1984) 15

BRIEF FOR APPELLEE AMERICAN BAR ASSOCIATION

STATEMENT

The American Bar Association ("ABA") is a private voluntary professional association of approximately 343,000 attorneys throughout the United States. One of the principal goals of the ABA is to promote the administration of justice. In furtherance of this goal, the ABA established the ABA Standing Committee on Federal Judiciary (the "ABA Committee") in 1946.[1] Neither the ABA nor the ABA Committee was established by, is affiliated with or controlled by any federal or state governmental entity.

A. The Federal Judicial Appointment Process And The ABA Standing Committee On Federal Judiciary

The Constitution grants the President power to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint" members of the federal judiciary. U.S. Const. art. II, § 2. In exercising this power of appointment, the President traditionally consults with many people, including Justice Department officials, members of Congress and the President's political advisors. Those individuals may, in turn, reflect the views and opinions of the law school community, practicing lawyers, state and local bar associations and many other sources. Public Citizen Jurisdictional Statement ("J.S.") App. 4a. During the course of the Senate confirmation process, the Senate—and, in particular, the Senate Judiciary Committee—considers a similarly wide range of views. This case involves appellants' efforts to invoke the Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA" or "Act"), in regulating the efforts of one organization, the

---

[1] *Report of the Special Committee on Judiciary*, 71 Annual Report of the American Bar Association 330-31 (1946). The ABA's interest in judicial selection long predates the establishment of the ABA Committee. *See, e.g., Report of the Committee on Judicial Selection*, 10 A.B.A. J. 820-24 (1924).

ABA, to gather information and to express its views during the judicial appointment process.

The ABA Committee for many years has evaluated the professional qualifications of prospective nominees for the federal judiciary. See ABA, *Standing Committee on the Federal Judiciary: What It Is and How It Works* 1 (1983) (*"Standing Committee"*), J.A. 43. In order to avoid compromising its position as a neutral evaluator, the ABA Committee never proposes or recommends candidates for the judiciary. *Id.* Rather, the ABA engages in peer review of the professional qualifications of persons identified by the President, through the United States Department of Justice, as potential nominees to the federal bench. J.S. App. 5a; see *Washington Legal Foundation* v. *American Bar Association Standing Committee on the Federal Judiciary*, 648 F. Supp. 1353, 1355 (D.D.C. 1986) (*"WLF I"*). The Committee's evaluation of prospective nominees to the federal judiciary has been provided to the President since 1952 and to the Senate Judiciary Committee since 1948. *Standing Committee*, J.A. 43.[2]

---

[2] The ABA's relationship with the Justice Department was formalized by President Eisenhower and his Attorney General, Herbert Brownell. 78 Annual Report of the American Bar Association 224 (1953). At the Attorney General's request, the ABA at that time ceased recommending prospective nominees and instead provided evaluations of those prospective nominees identified by the Justice Department. *Id.* The original purpose of soliciting evaluations from the ABA was to provide an "outside" and objective evaluation of a prospective nominee's qualifications to serve in the federal judiciary and to avoid overtly political decisionmaking in the judicial selection process:

> The purpose of all this [the work of the ABA Committee] was to keep political cronies from ending up being placed on the bench. So we went to people—our predecessors went to people—who were, and are, highly respected, and said we want you to give us your best professional opinion about the competence of these people, not their political content, but their professional competence.

See Transcript of Proceedings, *Nomination Hearings of Anthony M. Kennedy Before the Senate Comm. on the Judiciary*, 65, 100 Cong., 1st Sess. (Dec. 16, 1987) (statement of Sen. Biden).

The initial fact-gathering on a prospective nominee usually is performed by the member of the ABA Committee for the Circuit in which the relevant judicial vacancy exists. J.S. App. 5a-6a; *Standing Committee*, J.A. 46-48. That Committee member examines the available legal writings of the prospective nominee and conducts confidential interviews with judges, law professors and lawyers in the potential nominee's community. The goal of the initial investigative process is to obtain information concerning the prospective nominee's professional competence, integrity and temperament. *Id.* at 47. The Committee member also will meet with the prospective nominee, affording that person the opportunity to discuss his or her qualifications and to respond to the information gathered during the initial interview process. J.S. App. 6a; *Standing Committee*, J.A. 48.

Confidentiality is absolutely essential to the Committee's work. If the persons interviewed knew that their opinions might be disclosed to the public or even to a federal agency, they would not be willing to speak candidly about the qualifications of a prospective candidate in whose court they might later appear. Because lack of candor would have a crippling effect on the Committee's evaluations, every attempt is made during the interview process to protect the confidentiality of information provided not only by the prospective candidate, but also by all other persons interviewed. J.S. App. 6a. The details of those interviews, including the identity of the interviewees, are not disclosed to the public or to the Justice Department. *Id.*

At the conclusion of the information-gathering process, the Circuit member prepares a confidential written report to the Chairman of the ABA Committee. This report contains a description of the prospective nominee's background, summaries of all interviews conducted (including the interview with the prospective candidate), an evaluation of the prospective nominee's qualifications and one of four recommended ratings ("Exceptionally Well Qualified," "Well Qualified," "Qualified," or "Not Quali-

fied"). J.S. App. 6a. In cases where a rating of "Not Qualified" is a significant possibility, that fact is communicated orally to the Department of Justice before the process goes beyond the information-gathering stage. ABA Answer to Washington Legal Foundation ("WLF") Complaint, ¶¶ 11-12, J.A. 65-66. On occasion when that happens, the Department has informed the Committee that the prospective nominee's name was being withdrawn from consideration for a particular vacancy. *Id.*

Absent the Department's withdrawal of the nominee's name from consideration, the Circuit member sends to all members of the Committee a confidential formal report, the response to a personal data questionnaire and any other materials thought relevant by the Circuit member. *Standing Committee*, J.A. 48. After studying the formal report and its enclosures, each member transmits by mail or telephone a vote to the Chair. *Id.* If questions are raised, the ABA Committee may discuss the prospective nominee by telephone conference call or at a meeting. *Id.*

The Chair then confidentially informs the Attorney General, in a very brief report, of the ABA Committee's rating. J.S. App. 5a-6a. If the Committee has been unanimous in its rating, the report so states. *Id.* Otherwise, the report reflects the rating given by a majority or a substantial majority of the Committee. Thus, the ABA Committee, in reporting to the Department of Justice, discloses only the rating and the degree of unanimity of Committee members in reaching that rating. Neither the contents of the Circuit member's report nor the contents of any of the interviews or other background information are disclosed.

The rating of the ABA Committee, together with other information, such as the Federal Bureau of Investigation's reports and the prospective nominee's financial and medical background, are then considered by the Attorney General in making a recommendation to the President. J.S. App. 7a. If the President nominates the prospective nominee, the ABA Committee submits its rating to the

Senate Judiciary Committee prior to the Judiciary Committee's hearing on the nominee.[3]

B. The Federal Advisory Committee Act

FACA establishes "standards and uniform procedures" to govern, *inter alia*, the "operation" of federal advisory committees. 5 U.S.C. App. II §§ 2(a), (b)(4). Various requirements apply to groups that are found to be "advisory committees" within the meaning of the Act. For example, "an officer or employee of the Federal Government" (an "advisory committee management officer") is required to "chair or attend each meeting of each advisory committee" and advisory committees are flatly prohibited from conducting "any meeting in the absence of that officer or employee." *Id.* § 10(e). When chairing or attending such advisory committee meetings, the "management officer" is authorized to "adjourn" any meeting "whenever he determines it to be in the public interest." *Id.* FACA also requires advisory committees to provide advance notice of meetings and to hold open meetings, *id.* § 10(a), although a committee meeting may be closed to the public if the Government invokes one of the exemptions to the Government-in-the-Sunshine Act. *Id.* § 10(d). FACA further mandates that "the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda or other documents" provided to or prepared by an advisory committee must be made "available for public inspection and copying," although the Act permits the Government to withhold records falling within one of the exemptions to the Freedom of Information Act. *Id.* § 10(b). See also *infra*, 34-36 (listing other requirements of Act).

C. The Proceedings Below

On December 11, 1985, appellant WLF filed suit against the ABA Committee, its members and the ABA,

---

[3] In those instances—less than 1 percent of the nominations—where a President has nominated a person found "Not Qualified" by the ABA Committee, the Committee opposes the nomination. *Standing Committee*, J.A. 49.

to enjoin defendants to apply the requirements of FACA to the ABA "Committee's role . . . in the screening and selection of judicial candidates suitable for consideration by the President." WLF Br. 10. The WLF sought access to the meetings and information of the ABA Committee that the Committee allegedly had shared with "certain liberal activist groups," *id.*,[4] and sought an order reconstituting the ABA Committee so that it would have a "fairly balanced membership" in terms of points of view represented. *WLF I*, 648 F. Supp. at 1355 (quoting WLF complaint). The district court granted the ABA's motion to dismiss that complaint on the ground that FACA does not create a private right of action solely against a private group such as the ABA Committee. *Id.* at 1361 & n.7.[5]

On October 21, 1986, WLF filed its complaint in the present action against the United States Department of Justice requesting "declaratory and injunctive relief with respect to, *inter alia*, DOJ's failure to . . . require that [ABA Committee] meetings be open to the public, and DOJ's failure to maintain and provide the plaintiff and public access to advisory committee records." J.A. 5. WLF's complaint emphasized its interest in "participat[ing] further in the federal judicial selection process, including attending and participating in meetings held by the ABA Committee, reviewing their records and reports, and providing relevant information to WLF's members and the public." WLF Complaint ¶ 3, J.A. 6. WLF also made clear in the complaint that it viewed

---

[4] Prior to filing suit, WLF, in correspondence with the ABA, requested that the ABA "provide us with the reports and minutes of all meetings of your committee held during the last two years . . . [and] inform us of the date and place of all future meetings." J.A. 15.

[5] That ruling is not at issue in this case. WLF has appealed *WLF I* to the Court of Appeals for the District of Columbia Circuit, which has held that proceeding (No. 87-7022) pending the outcome of this case.

access to the workings of the ABA Committee as a means to rectify a perceived ideological imbalance in the Committee. Its complaint stated that "[a]t least since the election of President Reagan in 1981, the ABA has investigated . . . judicial candidates' political and ideological philosophy . . . in such a way as to penalize or discredit candidates who hold or profess conservative principles or ideology, and to delay or prevent their nomination by the President." *Id.* at ¶ 10, J.A. 7.

On August 4, 1988, the district court granted the Justice Department's motion to dismiss the complaint or, in the alternative, for summary judgment. Although it concluded that the ABA Committee "falls within FACA's definition of advisory committee," J.S. App. 14a, the court held that application of FACA's requirements to the activities of the ABA Committee would violate the constitutional principle of separation of powers.[6]

The district court began its constitutional analysis by noting that there is a "specific fundamental distinction" between the Executive and Legislative Branches' roles in the judicial nomination process, and that distinction is clear from the "text of the Constitution." J.S. App. 17a, 19a. Article II, § 2, cl. 2 clearly grants to the President the sole authority to nominate judges, while reserving the power to advise and consent to the Senate. J.S. App. 15a. Thus, the court concluded that it would be unconstitutional to apply a statute, including FACA, that would "intervene in the Executive's selection process for judicial nominees." *Id.* at 19a.

---

[6] Subsequent to the filing of the Justice Department's motion, appellant Public Citizen requested and was granted leave to intervene. In its complaint, Public Citizen stated that one of its "primary objectives" as a public interest organization was to "increase government accountability through open government laws such as the FACA." Complaint ¶ 3, J.A. 25. Accordingly, Public Citizen sought to enjoin the Justice Department "to comply with the FACA's requirements when it utilizes the ABA Committee in the future." J.A. 26.

In addition, the court held that application of FACA to the ABA Committee's evaluation of judicial nominees would not survive the "more flexible, pragmatic approach" to separation of powers issues set forth in *Nixon* v. *Administrator of Gen. Services*, 433 U.S. 425 (1977). Under that standard, a statute with the "potential for disruption" of the "constitutionally assigned functions" of the Executive Branch may be upheld only if "justified by an overriding need to promote objectives within the constitutional authority of Congress." J.S. App. 19a-20a (quoting *Nixon*, 433 U.S. at 443). In this case, the court found that application of FACA created an "obvious and significant potential for disruption" of the President's ability to obtain "confidential, candid and timely advice concerning the qualifications of potential nominees for the federal courts." J.S. App. 20a.[7]

Finally, the court found no " 'overriding' congressional interest in application of FACA to the ABA Committee." J.S. App. 25a. The court reiterated that "the only role for Congress in the nomination process envisioned by the Constitution is the Senate's advice and consent function." *Id.* Moreover, the court stated that the congressional interest in the "accountability" of the ABA Committee is "satisfied through the confirmation proceedings, where the Senate Judiciary Committee has the opportunity to question a representative from the ABA Committee and to request additional information." *Id.* Thus, "Congress can seek greater accountability directly, without interfering in the initial selection process through FACA." *Id.* Because WLF and Public Citizen were unable to "articulate[] any compelling, let alone overriding, congressional justification for applying FACA to the ABA Committee," the district court concluded that "application of

---

[7] The court found that "application of FACA to the ABA Committee will discourage DOJ from consulting the ABA Committee or, alternatively, will discourage that Committee from continuing to perform the service of investigating and evaluating potential federal judicial nominees." J.S. App. 20a-21a.

the statute would, therefore, be unconstitutional." *Id.* at 26a.[8]

SUMMARY OF ARGUMENT

1. Article III of the Constitution requires a party who invokes a federal court's authority to show (a) that he or she personally has suffered some actual or threatened injury as a result of the purportedly illegal conduct of the defendant, and (b) that the injury is likely to be redressed by a favorable decision. In this case, neither of these requirements is met by either appellant.

Both appellants suggest that the Justice Department's "failure" to apply FACA properly has deprived them of access to ABA Committee meetings and documents and has precluded them from participating more effectively in the judicial selection process. Such allegations are precisely the type of abstract injuries—generally shared by every citizen—that this Court has deemed insufficient to confer standing. See, e.g., *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 470-71 (1982); *Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1975). Furthermore, both appellants now concede that, because of exemptions available under FACA, the meetings and documents of the Committee likely will remain confidential. See Public Citizen Br. 36-38, 41, 45; WLF Br. 40-41; Appellants Joint Motion for Divided Oral Argument at 2. Thus, under appellants' own view, a favorable decision in this case probably will provide *no* redress for their alleged "injury," *i.e.*, lack of access to the confidential workings of the ABA Committee. Accordingly, because appellants lack any distinct and palpable injury which is likely to be redressed if the requested relief is granted, they lack standing to pursue this litigation. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

---

[8] After entry of judgment, the ABA intervened in the district court as a party defendant for the purpose of participating in this appeal in order to defend the judgment of the district court.

2. The relationship between the ABA Committee and the Executive Branch should not bring the Committee within the scope of FACA and subject the Committee to the intrusive regulatory scheme of that Act. The district court's wooden approach to statutory interpretation would result in application of FACA to *every* private organization whose views are regularly considered or otherwise "utilized" by the Executive Branch with respect to Presidential appointments. In applying a literalist interpretation, the district court erred by failing to require a clear statement of congressional intent before interpreting an Act of Congress to invade an area of decision-making traditionally and exclusively reserved to the Executive Branch. Compare *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 643-44 (1986). Under the overly broad interpretation of FACA advocated by appellants, in order for the Executive Branch to seek advice concerning Presidential appointments from a private organization, the Executive Branch must intrude into the operations of that organization by applying the Act—an anomalous result which maximizes the probability that application of FACA would violate the Appointments Clause and the First Amendment of the Constitution.

A careful examination of FACA's legislative history and the purposes underlying the Act indicates that FACA was never intended to interfere with the formulation and expression of a private organization's views concerning Presidential appointments or with the President's ability to obtain and consider such views. By enacting FACA, Congress sought to (a) reduce escalating and wasteful federal expenditures to finance the burgeoning number of advisory committees, and (b) diminish the influence of special interest groups, in particular regulated entities, over the formulation of federal policy as to which Congress had a legitimate role. Because neither of these purposes is implicated here, the Act should not be interpreted to apply to the ABA Committee.

3. The district court correctly held that "Congress cannot impose FACA in this case because of the specific limitation" of the Appointments Clause. J.S. App. 16a. That Clause vests in the President the exclusive authority over the nomination of federal judges. Accordingly, it is not for Congress to dictate or limit the means by which the President obtains advice in exercising his power to nominate federal judges. As the district court noted, "the conclusion that the Legislative Branch cannot intervene in the Executive's selection process springs directly from the text of the Constitution." J.S. App. 19a.

The appointment power, like the treaty power, is one area where the Constitution draws a clean line between what the President does and what Congress does. The Constitution gives the President the unfettered discretion to decide from which persons and groups to seek advice, and how to go about obtaining that advice. The Senate may advise and consent—but only after the candidate has been nominated. The Framers intended that the President alone bear responsibility for selecting judicial nominees and therefore could not have intended to allow Congress to interfere with the President's process of selecting nominees. The unqualified vesting of the appointment power in the President, plus the specific identification of the limited role played by Congress, make it abundantly clear that any congressional participation in the nomination and appointment of federal judges beyond the Senate's defined advice and consent power violates the Appointments Clause.

4. Application of FACA to the activities of the ABA Committee would substantially infringe the Committee's freedom of association. For example, appellants would require the ABA Committee to hold its meetings only with a government official in attendance and only "at the call of, or with the advance approval of" that government official. 5 U.S.C. App. II § 10(e)-(f). Moreover, WLF seeks an order requiring that all of the ABA Committee's meetings and records be opened to the public. J.A. 9-11. Thus, application of FACA would require

the government to regulate every aspect of the Committee's associational activities, including when it may meet, what it may discuss and with whom it must share its opinions.

Application of FACA also would substantially impair the Committee's right to free speech. In essence, WLF seeks to change the content of the ABA Committee's speech, see, e.g., WLF Br. at 7 n.5, 8 n.7, 9 n.8, by forcing government regulation of, and by obtaining access to, the Committee's internal deliberations and communications.

There is no compelling interest served by the infringement of the ABA's First Amendment rights. The only relevant interests are those of the Executive Branch and the Justice Department's position in this case makes plain that the Executive Branch does not believe that its interests are served by subjecting the ABA Committee to the requirements of FACA. To the extent that Congress has an independent interest in this process, it can be fully satisfied by exercise of its advice and consent powers.

ARGUMENT

I. APPELLANTS LACK STANDING TO ASSERT THE GENERALIZED GRIEVANCES ADVANCED IN THEIR COMPLAINTS.

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." Subsumed within this constitutional limitation is the requirement that a federal court plaintiff must have standing to challenge the action sought to be adjudicated in the lawsuit. *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982); *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendants', and that the injury

'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge*, 454 U.S. at 472 (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979) and *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)); see *Meese* v. *Keene*, 107 S.Ct. 1862, 1869 (1987); *Diamond* v. *Charles*, 476 U.S. 54, 65-67 (1986); *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984).[9]

A. Appellants Have Suffered No Injury In Fact As Required By Article III.

With respect to "actual injury," WLF has asserted that it is "adversely affected and aggrieved" by the Justice Department's failure to apply FACA to the ABA Committee because it "wishes to participate further in the federal judicial selection process" by attending and participating in meetings of the ABA Committee. WLF Complaint ¶ 3, J.A. 6. Similarly, Public Citizen states that it "has a significant interest in the federal judiciary, and the process by which federal judges are chosen, because it regularly brings cases in the federal courts on behalf of itself and others." Public Citizen Complaint ¶ 3, J.A. 25.[10] Thus, both appellants' complaints suggest

---

[9] This Court also has adhered to the principle that the Court will refrain from adjudicating "abstract questions" of law which amount to "generalized grievances" pervasively shared by the public at large. *See Warth* v. *Seldin*, 422 U.S. at 499-500.

[10] The only other suggestion of possible injury is Public Citizen's statement that "its effectiveness in many areas [*i.e.*, public education, lobbying and litigation] is dependent on its access to advisory committees and their documents." Public Citizen Complaint ¶ 3, J.A. 25. In essence, Public Citizen—which seeks to "increase government accountability through open government laws such as the FACA" (J.A. 25)—is claiming an "institutional" interest in having the law interpreted properly. It is clear, however, that generalized harm to Public Citizen's institutional and litigating interests does not constitute the "distinct and palpable injury" (*Valley Forge*, 454 U.S. at 475) necessary to satisfy Article III. Moreover, that is the type of "generalized grievance" "shared in substantially equal measure by all or a large class of citizens" which has been held not to constitute an "injury" sufficient to

that the Justice Department's "failure" to apply FACA properly (and thereby provide them with access to ABA Committee meetings and documents) has resulted in some "lost opportunity" to participate more effectively in the judicial selection process.

Such allegations are precisely the type of unspecified and "abstract" injuries that this Court has deemed insufficient to confer standing. See *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 216-227 (1974); *Allen* v. *Wright*, 468 U.S. 737, 752-53, 757-59 (1984). Neither appellant has pointed to any specific instances where lack of access to ABA Committee information has impaired its ability to make its voice heard in the judicial nomination process. Indeed, appellants plead no specific facts that would place this dispute in a "concrete factual context conducive" to litigation of this issue. *Valley Forge*, 454 U.S. at 472.

Whatever interests the appellants have in the competence, integrity and judicial philosophy of federal judges—and in the role of the ABA Committee's evaluations in the nomination of those judges—are shared by every citizen. The case and controversy requirement of Article III requires much more than an unfocused allegation of interest. As this Court stated in *Valley Forge*:

> Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums.

Valley Forge, 454 U.S. at 473. At bottom, appellants simply are complaining about an intangible injury to

---

confer standing. *Warth* v. *Seldin*, 422 U.S. at 499; *see Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100.

their particular value interests. They believe, but cannot show, that those interests would be better served if they had access to the deliberations and documents of the ABA. But, "Article III requires more than a desire to vindicate value interests . . . ." *Diamond* v. *Charles*, 476 U.S. at 66. Accordingly, appellants lack the actual and concrete injury necessary to provide standing in this case.[11]

B. There Is No Discernible Relationship Between The Injury Asserted By Appellants And Any Relief They Could Receive In This Case.

Even if appellants had alleged an adequate injury in fact, "a mere showing of personal injury is not sufficient to establish standing; [this Court has] also required that the injury be 'fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Meese* v. *Keene*, 107 S.Ct. at 1869. These requirements of "causation" and "redressability" constitute independent grounds for denying standing—even where "injury in fact" exists. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* §§ 3531.5-3531.6 (1984); see *Allen* v. *Wright*, 468 U.S. at 751-53; *Heckler* v. *Mathews* 465 U.S. at 738; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38, 41; *Warth* v. *Seldin*, 422 U.S. at 499.

Both appellants now essentially have conceded that a favorable decision in this case will provide no redress for their claimed "injury," *i.e.*, a lack of access to information regarding the confidential workings of the ABA Committee. See WLF Complaint ¶ 3, J.A. 6; Public Citizen Complaint ¶ 9, J.A. 26; see also *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38,

---

[11] In fact, appellants have not demonstrated why FACA should be construed to give rise to an implied cause of action under any circumstances. *See Cort* v. *Ash*, 422 U.S. 66, 78 (1975); *Cannon* v. *University of Chicago*, 441 U.S. 667 (1979).

41. Public Citizen expressly has disavowed "extreme and unrealistic requests for relief" (Public Citizen Br. 38 n.7), stating that it is, instead, seeking only to impose the "threshold requirements" of FACA on the ABA Committee.[12] In fact, Public Citizen concedes that "most, if not all, of the ABA Committee's discussions" of potential nominees would be kept confidential under the exemptions to the Act. Public Citizen Br. 45; see *id.* at 36, 38, 41; Appellants' Joint Motion for Divided Oral Argument at 2. Similarly, WLF now has seemingly disavowed its earlier demands for immediate access to ABA Committee meetings and documents and essentially has adopted the position that application of FACA will lead to no public disclosure of information. See WLF Br. 40-41. Indeed, WLF now emphasizes that its proposed order for the district court requests only a declaration that "the defendant Justice Department's utilization" of the ABA Committee is "covered by" FACA. J.A. 33

Thus, this case squarely falls within that line of decisions which rests on the "Article III requirement" that "the plaintiff who seeks to invoke judicial power [must] stand to profit in some personal interest . . . ." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 39. In *Eastern Kentucky*, standing was denied to a group of indigent plaintiffs who sought to challenge an Internal Revenue Service regulation which reduced the amount of indigent services that a hospital had to provide in order to maintain its status as a charitable organization. Despite allegations that the plaintiffs had in fact been denied services by hospitals subject to the regulation, standing was denied on the ground that it was "purely speculative" whether these particular plaintiffs had been denied treatment *because* of the regulation in question and

---

[12] According to Public Citizen, the "threshold requirements" of the FACA are (1) filing a charter; (2) designating a federal oversight officer; and (3) announcing committee meetings in advance. Public Citizen Br. 9.

whether invalidation of the regulation would in fact result in a change of hospital policies. 426 U.S. at 42-46.[13]

Appellants' showing of causation and likelihood of redress is far more tenuous than those in *Eastern Kentucky*, *Warth* v. *Seldin*, or *Allen* v. *Wright*. At bottom, both appellants have conceded in this Court, as they must, that the meetings and documents of the ABA Committee should *not* be made public. Indeed, if the work of the Committee is to be of any use to the Executive Branch in the nominating process, it must be done in confidence. Success in this litigation would disrupt the work of the Committee,[14] but there is no reason to assume that it would result in the public release of *any* information—or provide any other tangible benefit—to appellants. Thus, because appellants lack any distinct and palpable injury that is likely to be redressed if the requested relief is granted, they lack standing under Article III to pursue this litigation.

---

[13] *See also Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973) (denying plaintiff standing to enjoin enforcement of criminal statute requiring payment of child support, despite undisputed injury, on ground that link between criminal enforcement and actual payment was "only speculative"); *Warth* v. *Seldin*, 422 U.S. at 508 (denying standing to low and moderate income persons seeking to challenge certain exclusionary zoning restrictions because there was no evidence that plaintiffs would obtain housing absent the zoning ordinances); *Allen* v. *Wright*, 468 U.S. 737 (1984) (denying standing to parents of children in public schools, who sought to challenge tax exempt status of private schools that discriminated on the basis of race because there was no showing that a change in tax exempt status would affect attendance at private schools).

[14] For example, the application of FACA would (1) allow a federal "Management Official" to attend and essentially control Committee meetings (§ 10(e)-(f)) and (2) result in the disclosure of Committee documents to the Justice Department. Thus, despite the fact that the workings of the Committee might be shielded from *public* scrutiny—and appellants would gain no concrete benefits—application of FACA would have a substantial detrimental effect on the workings of the ABA Committee and would call into serious question the ABA's continued ability to provide useful evaluations to the Justice Department. *See infra*, 34-37.

II. CONGRESS DID NOT INTEND FACA TO APPLY TO THE EXECUTIVE BRANCH'S USE OF ADVICE FROM PRIVATE ORGANIZATIONS CONCERNING PRESIDENTIAL APPOINTMENTS.

A. The District Court's Overly Literal Interpretation Of FACA Is Contrary To The Applicable Rules Of Statutory Construction.

Section 3 of FACA defines the term "advisory committee" as "any committee" which is:

> (A) established by statute or reorganization plan, or
>
> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . . ."

5 U.S.C. App. II § 3(2). The statutory issue in this case is whether the ABA Committee is a "committee . . . which is utilized by the President . . . or utilized by one or more agencies" as Congress intended those terms to be applied under FACA.

Under the interpretation of FACA urged by appellants, *any* private organization whose opinions or recommendations are regularly considered by the Executive Branch is "utilized" within the meaning of the statute and therefore subject to FACA. Thus, for example, if a President regularly accepts advice with respect to Labor Department appointments from the AFL-CIO, or advice with respect to appointments in the Department of Veterans' Affairs from the American Legion, or advice concerning potential nominees to the EEOC or EPA from the NAACP or Sierra Club, each of those organizations would become subject to FACA. But, the notion that federal officials must attend and have power to control a private organization's meetings and files in order for that organization to provide advice with respect to

Presidential Appointments is patently absurd.[15] That notion never was contemplated, and certainly not intended, by Congress.[16]

The fundamental error in the interpretation of the statute adopted by the district court and advocated by the appellants is that both presume that Congress intended to regulate an area that the Constitution exclusively commits to the Executive Branch. But this Court has long recognized that Congress will not be presumed to alter the constitutional balance of power by entering an area traditionally regulated by another governmental entity absent a "clear statement" of congressional intent. See *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 643-44 (1986); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 354-355 (1941); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513 (1940); *United States* v. *Bass*, 404 U.S. 336 (1971).[17]

---

[15] Statutes should not be interpreted literally if such an interpretation leads to an absurd result. *United States* v. *Bryan*, 339 U.S. 323, 338 (1950); *United States* v. *Brown*, 333 U.S. 18, 26-27 (1948).

[16] For nearly a century, this Court has recognized that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892). *See also United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 849 (1975); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

[17] In the *Bowen* line of cases this Court has held that it would not presume that Congress, in legislating pursuant to its Commerce Clause power, intended to regulate an area traditionally left to the states absent a "clear statement" by Congress that it intended to do so. The Court has applied this "clear statement" doctrine even though Congress has *plenary* authority to act pursuant to its Commerce Clause power and the federalism interest protected under the doctrine is only *implicit* in the Constitution. It would be anomalous, to say the least, to have a rule of construction which requires Congress to make its intentions clear before interfering with traditional state prerogatives, and yet allow Congress to invade unwittingly the exclusive authority of the Executive Branch *explicitly* set forth in the Constitution, particularly where congressional authoirty vis-a-

What is striking about this case is that, unlike other recent separation of powers cases, it is clear that Congress, in enacting FACA, did not seriously consider any potential separation of powers issues. By contrast, when Congress chose to impose a sentencing commission on the judiciary, to permit an independent prosecutor to oversee Executive Branch activities, and to allow a congressional agency to set spending limits upon the Executive Branch, it did so with a clear intention to test the limits of the separation of powers doctrine in order to serve a significant governmental purpose identified by Congress. Under appellants' theory, Congress in this case has stumbled into a serious constitutional issue. Before this Court entertains a significant separation of powers issue, it should satisfy itself that Congress intended FACA to be interpreted in a manner that would create a constitutional issue for this Court to resolve. Because it is clear that Congress had no such intent in enacting FACA, this Court should limit the reach of FACA to those committees Congress clearly intended to reach, *i.e.*, committees established by or for the benefit of a federal agency. See *infra*, 22.

The interpretation of FACA adopted by the district court also fails to adhere to the well-established principle that a statute should be interpreted, if reasonably possible, to avoid serious constitutional questions. See, e.g., *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Although the court below acknowledged this fundamental principle of statutory interpretation (J.S. App. 14a), it

---

vis Presidential nominations is not plenary but, at best, *doubtful*. *See infra*, 27-34.

The clear statement rule, as advocated by the ABA here, is a narrow one because it would apply only to those executive powers—such as the pardon power, the power to make treaties and the appointment power—which are particularly enumerated in Article II as belonging exclusively to the Executive Branch. Given the unique status of these few "enumerated" executive powers, it would be a small or nonexistent burden for Congress to speak clearly when it intends to legislate in a way that affects these powers.

adopted the broadest possible interpretation of FACA—an interpretation that places the Act in direct confrontation with constitutional constraints on Congress' power. See *infra*, 26-48.[18]

B. Congress Did Not Intend FACA To Apply To Organizations Such As The ABA Committee.

1. The term "utilized" was not included in either the original House or Senate bills. The House bill limited the definition of "advisory committee" to a committee "*established*" by statute, the President, or an agency "in the interest of obtaining advice or recommendations for the President or one or more agencies." H.R. 4383, 92d Cong., 2d Sess. § 3(2), 118 Cong. Rec. 16300 (1972), *reprinted in* Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts and Other Documents*, 95th Cong., 2d Sess. 301 (Comm. Print 1974) (emphasis added) (hereinafter "*Source Book*"). The Senate bill defined the phrase "agency advisory committee" as a committee or similar group "*established* or *organized* under any statute or by the President or any officer of the Government for the purpose of furnishing advice, recommendations, or information to any officer or agency . . ." S. 3529, 92d Cong., 2d Sess. § 3(1) (1972), *reprinted in Source Book* at 174-75 (emphasis added); see S. Rep. No. 1098, 92d Cong., 2d Sess. 2 (1972), *reprinted in Source Book* at 152; *id.* at 156-57; 118 Cong. Rec. 30271-72 (1972) (remarks of Sen. Metcalf), *reprinted in Source Book* at 198.

Both the district court (J.S. App. 8a) and appellants rely upon the broad definition of "established" or "or-

---

[18] Contrary to appellants' claims, the courts applying FACA have recognized that, because of the breadth and imprecision of FACA's language, a literal application of the statute would "threaten to impinge unduly upon prerogatives preserved by the separation of powers doctrine." *National Anti-Hunger Coalition* v. *Executive Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983).

ganized" to support the proposition that "utilized" also should be broadly interpreted. But the available evidence shows that Congress did not intend "utilized" to have the literal meaning ascribed to it by appellants.

The term "utilized" was added to the current definition of "advisory committee" in the conference committee. See H.R. Rep. No. 1403, 92d Cong., 2d Sess. 2, 9 (1972), *reprinted in Source Book* at 316, 323; 118 Cong. Rec. 31420-21 (1972) (statement of Rep. Monagan), *reprinted in Source Book* at 331. It is clear from the Report's language, however, that Congress did not intend that this term would be construed expansively. Rather, Congress intended the term "utilized" to reach only those committees that were established *by* an agency or those established by a private group *for* an agency or at an agency's request. The Conference Report plainly states that "[t]he Act does not apply to . . . advisory committees not directly established *by or for such agencies.*" *Id.* at 324 (emphasis added).[19] Because the ABA Committee —which was established in 1946, prior to the development of its relationship with the Executive Branch (see *supra*, 1-2)—was not established "by or for" the Department of Justice, it does not fall within the definition of "advisory committee," as that term was used by Congress.

2. Congress enacted FACA to achieve two broad purposes: (1) to control and reduce the costs of advisory committees, in part by eliminating some of them;[20] and

---

[19] This construction was reiterated in a colloquy on the floor of the House. 118 Cong. Rec. 31421 (1972) (statement of Rep. Holifield), *reprinted in Source Book* at 332.

[20] *See* 118 Cong. Rec. 16296 (1972) (statement of Rep. Monagan), *reprinted in Source Book* at 293; 118 Cong. Rec. 30271-72 (1972) (statement of Sen. Metcalf), *reprinted in Source Book* at 198; 118 Cong. Rec. 30274 (1972) (statement of Sen. Percy), *reprinted in Source Book* at 201; 118 Cong. Rec. 30278 (1972) (statement of Sen. Brock) *reprinted in Source Book* at 209. Prior to the enactment of FACA, some Presidential advisory committees apparently spent over $1 million in federal funds, only to have their reports ignored. S. Rep. No. 1098, 92d Cong., 2d Sess. 3 (1972), *reprinted*

(2) to diminish the influence of regulated entities in policy matters over which the Congress has legislative authority.

Throughout the legislative history, there are clear indications that Congress intended FACA to protect *its own policy-making prerogatives* from the influence of quasi-legislative advisory committees.[21] FACA was designed to control the "system of advisory committees that has grown up over the years [that] might well be described as a fifth arm of the Government, existing alongside the executive, legislative, judicial and regulatory arms. There is a growing awareness that an invitation to advise can by subtle steps confer the power *to regulate and legislate*." S. Rep. No. 1098, 92d Cong., 2d Sess. (1972) *reprinted in Source Book* at 163 (emphasis added).[22]

---

in Source Book at 153. The cost of these committees had been a longstanding concern of the Congress. *See* 5 Stat. 533; 35 Stat. 1027; 58 Stat. 337.

[21] S. Rep. No. 1098, 92d Cong., 2d Sess. 1 (1972) (emphasis added), *reprinted in Source Book* at 151; *see also* 118 Cong. Rec. 30271-72 (1972) (remarks of Sen. Metcalf), *reprinted in Source Book* at 197-98; 118 Cong. Rec. 16299-300 (1972) (statement of Rep. Brown), *reprinted in Source Book* at 299-300; 118 Cong. Rec. 30273-74 (1972) (statement of Sen. Percy), *reprinted in Source Book* at 201; 118 Cong. Rec. 16296 (1972) (statement of Rep. Monagan), *reprinted in Source Book* at 293; House Comm. on Government Operations, *The Role and Effectiveness of Federal Advisory Committees*, H.R. Rep. No. 1731, 91st Cong., 2d Sess. (1970), *reprinted in Source Book* at 218.

[22] Congress also believed that many functions performed by advisory committees established by the Executive Branch and Congress should be performed by standing congressional committees. *See* 118 Cong. Rec. 16300 (1972) (statement of Rep. Brown), *reprinted in Source Book* at 300; *The Role and Effectiveness of Advisory Committees, Source Book* at 221. Advance notice of the creation of an advisory committee would provide Congress the "opportunity to challenge the establishment of such committees they felt were not necessary or were not relevant." S. Rep. No. 1098, *reprinted in Source Book* at 163.

Congress was particularly concerned about advisory committees that had become little more than fora for regulated special interests to persuade government regulators to adopt pro-industry positions—without the knowledge of Congress or any public scrutiny. By enacting FACA, Congress intended to strengthen its authority and to ensure that policy decisions were not unduly influenced by regulated entities. See *Natural Resources Defense Council, Inc.* v. *Herrington*, 637 F. Supp. 116, 120 (D.D.C. 1986).

3. Neither of the congressional concerns underlying the enactment of FACA is relevant to the activities of the ABA Committee in evaluating the professional qualifications of nominees to serve as federal judges. First, because no federal funds are expended by the Committee, the congressional goal of reducing federal expenditures and eliminating duplicative advisory committees is inapposite.

Second, the President's use of the ABA Committee does not implicate the congressional goal of eliminating or minimizing the influence of private parties—particularly regulated industries—over the formulation of government policy in areas where congressional policy should control. Congress simply has *no policy-making interest or authority* with respect to the President's decision to nominate a particular candidate to the federal judiciary. The only authority of Congress under the Appointments Clause is the Senate's power to confirm or reject the President's nominees to the bench. See *infra*, 27-34.[23]

Thus, there is no evidence in the legislative history that Congress intended to reach a committee, such as the ABA Committee, that assists the President in the

---

[23] Moreover, the ABA Committee clearly is not a federally regulated special interest similar to those that motivated the Congress to enact the open meeting, public access and balanced membership provisions of FACA. By evaluating the professional qualifications of candidates to the federal bench, the ABA is not attempting to promote its particular viewpoint to a federal agency that regulates the ABA.

exercise of a core constitutional function exclusively assigned to the Executive Branch—as opposed to execution of congressional policy, as reflected in a federal law.[24]

4. Any notion that Congress intended in enacting FACA in 1972 to invade the Executive Branch's exclusive province to nominate federal judges is belied by the Omnibus Judgeships Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978), in which Congress specifically recognized the constitutional limits against interfering in the judicial appointment process. In the Omnibus Judgeships Act, Congress conditioned an increase in the number of federal judges on the promulgation and publication by the President of standards and guidelines for the selection, on the basis of merit, of nominees for district court judgeships. This Act expressly recognizes

---

[24] Nor is there any support for the suggestion that "entities" similar to the ABA Committee were "clearly within Congress' contemplation when it drafted FACA." Public Citizen Br. 20. During fiscal year 1987, 177 federal advisory committees had some responsibility for federal grant review activities. *See Sixteenth Annual Report of the President on Federal Advisory Committees Fiscal Year 1987* at 1, 2 (1988). Contrary to appellants' assertion (Public Citizen Br. 5; WLF Br. 23-24), the ABA Committee is not similar to committees that decide who should receive federal largesse in the form of grants. First, there is no constitutional obstacle to the application of FACA to such committees because Congress may regulate these committees pursuant to its enumerated spending power provided in Article I. Second, the functions performed by these committees do not involve governmental power—such as the power to nominate—that is textually committed by the Constitution to the Executive Branch.

Similarly, appellants' references to the Tower Commission are inapposite. *See* WLF Br. 22 n.13; Public Citizen Br. 25. The Tower Commission, unlike the ABA Committee, was "established by" the Government and resulted in the expediture of governmental funds. Moreover, the fact that the President voluntarily chooses to apply FACA to an advisory committee on a politically sensitive subject has no bearing on the question whether the Constitution permits Congress to require the President to apply FACA where, as here, he objects to the intrusion on exclusive Executive prerogatives.

that the President can waive such standards and that "no nomination or appointment to a United States district court judgeship may be invalidated on the basis of the President's failure to comply with these provisions." 28 U.S.C. § 133.[25] Given Congress' express recognition of the limits of its legislative authority in the area of federal judicial appointments, it is plain that Congress did not intend FACA to be applied to private committees providing advice on such appointments. In any event, Congress has not expressed its intention with sufficient clarity to require this Court to construe FACA broadly enough to cover the ABA Committee and thereby intrude into the President's area of traditional and exclusive control over nominations.

III. APPLICATION OF FACA TO THE PRESIDENT'S AND JUSTICE DEPARTMENT'S USE OF THE ABA COMMITTEE WOULD VIOLATE THE APPOINTMENTS CLAUSE.

As the district court correctly held, the President, in exercising exclusive authority to nominate individuals to the federal bench, relies upon the investigations and evaluations of the ABA Committee. The application of FACA, which would effectively undermine the historical usefulness of the ABA Committee in providing an "outside" evaluation of prospective nominees, would impermissibly interfere with the President's nominating authority. This interference violates the Appointments Clause.

---

[25] The legislative history of this Act makes it clear that these provisions are precatory because the Congress recognized the constitutional limits on its power to control or regulate the President's selection process. As the Chairman of the House Judiciary Committee explained: "We feel this language [regarding the merit selection guidelines] is not only acceptable, but is in keeping with what are, frankly, constitutional realities. We have no power to circumscribe the President's nominating authority . . . ." 124 Cong. Rec. 33510 (1978) (statement of Rep. Rodino); *see* H.R. Rep. No. 858, 95th Cong., 2d Sess. 6-7 (1978); 124 Cong. Rec. 34544-45 (1978) (statement of Sen. Bayh) (even advisory selection procedure legislation poses separation of powers problems).

A. The President Has Exclusive Constitutional Authority To Nominate Persons To The Federal Judiciary.

The text of the Constitution, the history of the Appointments Clause and the opinions of this Court uniformly demonstrate that the *only* role of Congress in the selection, nomination and appointment of Article III judges is the advice and consent power of the Senate. Appellant WLF's argument that "the Senate was always considered to have a significant role to play in the [appointment] process" beyond its confirmation authority simply is wrong. WLF Br. 30.[26]

1. The Appointments Clause itself vests broad and unfettered discretion in the President to nominate candidates to the federal bench, subject only to the Senate's *subsequent* role of advice and consent.[27] Under the Appointments Clause, the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors,

---

[26] Appellant Public Citizen does not argue that Congress has a constitutional role beyond the Senate's advice and consent authority, but instead states that the proposed application of FACA to the ABA would somehow "further[] the Senate's understanding of the role and processes of the ABA Committee [and] certainly place the Senate in a better position to perform its advice and consent function effectively." Public Citizen Br. 31. But Congress does not need to apply FACA to perform fully its advice and consent function and, in any event, FACA does not apply to committees utilized by Congress. *See* 5 U.S.C. App. II § 3(2).

[27] Despite WLF's suggestion to the contrary (*see* WLF Br. 36-37), the district court correctly ruled that the fact "[t]hat the Attorney General acts as an intermediary between the ABA Committee and the President does not significantly alter the constitutional analysis." J.S. App. 11a n.31. The "President has partially delegated this responsibility to amass, collate, and analyze information from various sources and in consultation with others (including the President) to DOJ" but "[i]n the end, of course, it is the President, vested by the Constitution with the power of appointment, who makes the nomination." *Id.*

> other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for . . . .

U.S. Const. art. II, § 2, cl. 2.[28] The plain language of the Constitution sets forth the broad authority of the President to "nominate" and the Senate's distinct authority simply to confirm or reject the President's nominees.

The structure of the Constitution also supports a limited interpretation of the advice and consent power. It is significant that the only grant of congressional authority regarding judicial appointments is contained in Article II, Section 2. As this Court has noted:

> The words of section 2 [of Article II], following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the Executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such, being limitations, should not be enlarged beyond the words used.

Myers v. *United States*, 272 U.S. 52, 118 (1926).[29] Thus, the power of advice and consent—as a limitation on the

---

[28] Based on the language of the Appointments Clause which authorizes Congress to vest the appointment of "inferior officers" in "the President alone, Courts of Law, or Heads of Departments," WLF suggests that Congress could divest the President of the power to appoint judges of inferior courts. WLF Br. 33-35. This may be the logical conclusion of WLF's argument, but it is plainly wrong. This Court's decision in *Morrison* v. *Olson*, 108 S.Ct. 2597 (1988), makes clear that Article III judges are not "inferior officers" within the meaning of the Appointments Clause. *See id.* at 2608-09 (independent counsel is inferior officer because of limited duties, limited jurisdiction, limited tenure and removal power vested in Attorney General).

[29] James Madison suggested during the Constitutional Convention that a specific grant of the appointment power to the Executive would be unnecessary because such a power would be included within the broader executive power. He concluded, however, that the inclusion of the specific grant of appointment power "might serve

President's executive authority—must be strictly construed.

2. The history of the Appointments Clause at the Constitutional Convention similarly supports the conclusion that congressional authority in this field of judicial nominations and appointments is narrowly limited to the Senate's advice and consent power. Although there was substantial debate over "who should have the authority to appoint judges," *Morrison* v. *Olson*, 108 S.Ct. at 2610, the history is revealing on several points. First, after considerable debate, the Framers ultimately determined to vest the Executive with the sole constitutional nominating authority, to be checked only by Senate confirmation. Second, those who prevailed in advocating a broad grant of authority to the President believed that it was critical that the responsibility for nomination be vested in a single person—rather than in a more diffuse and unaccountable Congress. Finally, the Framers uniformly believed it appropriate to vest the power over judicial nominations in the branch with the most access to information about prospective nominees to the judiciary.

An early draft of the national constitution provided "that the national Judiciary be chosen by the National Legislature." 1 *The Records of the Federal Convention of 1787* 119 (M. Farrand ed. 1966) (hereinafter "Farrand"). James Wilson, who opposed this clause, stated that "[a] principal reason for unity in the Executive was that officers might be appointed by a single, responsible person." *Id.*[30] When, on July 18, 1787, the convention again returned to the issue of judicial appointments, the Framers took up consideration of Resolution number

---

to prevent doubts and misconstructions." 1 *The Records of the Federal Convention of 1787* 67 (M. Farrand ed. 1966).

[30] *See Morrison* v. *Olson*, 108 S.Ct. at 2610. James Madison moved that this provision be deleted and suggested that the Convention revisit this issue after determining how the executive would be selected. 1 Farrand at 232.

11, which established a National Judiciary, to consist of a single tribunal, "[t]he Judges of which to be appointed by the 2d branch of the Natl. legislature." 2 Farrand at 41. Again, there was a suggestion, this time by Madison, that the Executive appoint judges and that the Senate be given the power to object or concur. He argued that "[t]his would unite the advantage of responsibility in the Executive with the security afforded in the 2d branch agst. any incautious or corrupt nomination by the Executive." 2 Farrand at 42-43.[31]

On August 31, 1787, the appointment provisions of the draft constitution were referred to the Committee on Eleven which, on September 4, reported to the Convention a substitute that provided:

> The President . . . shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors and other public Ministers, Judges of the supreme Court, and all other officers of the U.S. whose appointments are not otherwise herein provided for.

2 Farrand at 495. This new language was approved by the Convention on September 7. See 2 Farrand at 539-40; see also *Buckley* v. *Valeo*, 424 U.S. 1, 131 (1976).

The Framers' ultimate decision to lodge the nominating authority solely in the Executive Branch, in order to ensure accountability and responsibility, was forcefully supported by Hamilton in *The Federalist* No. 76, from which the district court quoted extensively. J.S. App. 17a. Hamilton wrote:

> The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a

---

[31] Madison also noted that the President "would in general be more capable and likely to select fit characters than the Legislature." 2 Farrand at 80-81. Three days later, when the Convention reconsidered Madison's motion, Gouvernor Morris reiterated that the Executive would be better informed than the Senate. *Id.* at 82. Despite these arguments, the motion to empower the Executive to appoint, and to require approval by the Senate, was defeated. 2 Farrand at 83.

> more exact regard to reputation. He will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to it. In the act of nomination his judgment alone would be exercised; and as it would be his sole duty to point out the man, who with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment.

The Federalist No. 76 (Rossiter ed. 1961); see Story, *Commentaries on the Constitution* § 1529 (3d ed. 1858).[32] Thus, Hamilton explicitly recognized the critical role of the President's ability to conduct a thorough investigation prior to nomination—a vital function that would be frustrated by application of FACA to the ABA Committee.[33]

---

[32] In *The Federalist* No. 77, Hamilton again emphasized the personal accountability that results from vesting the sole nominating authority in the President, this time by drawing a comparison with a method of state judicial selection by committee:

> In that plan [*i.e.*, the federal Constitution] the power of nomination is unequivocally vested in the executive. [Under the federal system,] the circumstances attending an appointment . . . would naturally become matters of notoriety and the public would be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the president singly and absolutely.

Appellant Public Citizen quotes extensively from Hamilton's critique of the state nominating system and argues that application of FACA is consistent with increasing "public accountability" and thereby eliminating the very evils noted by Hamilton. Public Citizen Br. 30-31. But that argument misses the point—the Constitution itself strikes the balance that eliminates the evils noted by Hamilton.

[33] Other writing by the Framers indicates their belief that the President's power to exercise his nominating authority ought to be unrestricted. John Adams wrote:

> The President . . . ought to select the men best qualified and most meritorious for offices at his own responsibility, *without being shackled by any check by law, constitution, or institu-*

Not only do the debates and writings of the Founders buttress the conclusion that the President's nomination power is exclusive and plenary, they also make clear that the *only* formal congressional role is Senate confirmation after the nomination is announced.[34] Again, Hamilton is the best source of the Framers' intent:

> To what purpose then require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

The Federalist No. 76. Thus, the Framers intended Congress to have *no* power directly to affect the selection or nomination of candidates to the federal bench; the Senate was limited to the indirect, "silent" role of saying "yes" or "no" to the President's selections.[35]

---

tion. Without this unrestrained liberty, he is not a check upon the legislative power nor either branch of it.

IX *Works of John Adams* 634 (C.F. Adams ed. 1850-Reprint 1969-Books for Libraries Press) (emphasis added).

[34] With regard to the Senate's need to have information regarding nominees, Madison stated that:

> the Executive & Senate in the cases of appointments to Office & of Treaties, are to be considered as independent of and co-ordinate with each other. If they agree the appointments or treaties are made. If the Senate disagree they fail. If the Senate wish information previous to their final decision, the practice, keeping in view the constitutional relations of the Senate & the Executive has been either to request the Executive to furnish it, or to refer the subject to a committee of their body to communicate either formally or informally with the head of the proper Department.

4 *The Founders Constitution* (Kurland and Lerner, eds. 1987) 112.

[35] WLF makes much of the long-standing practice of senatorial courtesy whereby the President may consult with Senators with respect to nominees to the federal bench in their state. WLF Br. 30-32. While the existence of such a practice is undisputed, it

3. Finally, in addition to the language, structure and history of the Appointments Clause, this Court's decisions also reject any broader role for Congress beyond that of confirming the President's nominees. "[T]he moment an office and its powers and duties are created, the power of appointment . . . as limited by the Constitution, vests in the Executive." *Myers* v. *United States*, 272 U.S. at 118, 130-31; see *Buckley* v. *Valeo*, 424 U.S. at 132. Thus, Congress may control the President's process of selecting and nominating individuals to the federal bench only through the narrowly constrained authority of the Senate to advise and consent. *Myers*, 272 U.S. at 164; see *Buckley* v. *Valeo*, 424 U.S. at 121.

The President's authority to nominate judicial candidates is closely analogous to another power of the President under Article II, Section 2—the power to "make" or negotiate treaties, with the advice and consent of the Senate. With respect to the treaty power, this Court has stated:

> [the President] makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). It is clear that Congress is equally "powerless" to impose any conditions, limitations or restraints on the Presidential power to select and nominate individuals to the federal judiciary.[36] In both cases, the

---

clearly is a matter of Presidential political choice and has no bearing on the constitutional issues in this case.

[36] Appellants are wrong in arguing that this Court's decisions in *Mistretta* v. *United States*, 109 S.Ct. 647 (1989), and *Morrison* v. *Olson*, 108 S.Ct. 2597 (1988), control the outcome in this case. Neither of these cases involved congressional interference with a power of the Executive explicitly granted to the President by the text of the Constitution. In *Mistretta*, this Court plainly stated that "federal sentencing . . . never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of government." 109 S.Ct. at 650; *see id.* at

Constitution draws a clear line between Article II powers and Article I powers.

B. FACA Impermissibly Limits And Interferes With The Authority Of The President Under The Appointments Clause To Nominate Candidates To The Federal Bench.

1. In areas, such as the appointment process, where the Constitution explicitly delineates the respective roles of the Legislative and Executive Branches (*supra*, 27-28), this Court has not hesitated to strike down statutes that authorize the Congress to exceed its constitutionally defined role.[37] See *Bowsher* v. *Synar*, 478 U.S. 714, 727-36 (1986); *INS* v. *Chadha*, 462 U.S. 919, 956-59 (1983); *Buckley* v. *Valeo*, 424 U.S. at 124-133; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. at 319; *Myers* v. *United States*, 272 U.S. at 116. In this case, *any* congressional role in the nomination and appointment of federal judges beyond the defined Senate advice and consent power violates the Appointments Clause and is therefore unconstitutional.

2. Even assuming that the Appointments Clause permitted some *de minimis* congressional regulation of the nomination power, it is clear that the interference here is not *de minimis*. There is no question that—at a minimum—the following requirements would have to be met *immediately* upon application of the Act to the ABA Committee:

- Section 8 of the Act would require the Department of Justice to "designate an Advisory Committee

---

664. Similarly, the challenges to the independent counsel provisions of the Ethics in Government Act in *Morrison* did *not* involve any constitutional provisions which explicitly allocated specific powers between the Executive and Legislative Branches.

[37] Appellant WLF argues that the Necessary and Proper Clause authorizes a congressional role in the nomination process. Congress' power under this clause, however, is "inevitably bounded by the express language of Art. II, Sec. 2, cl. 2." *Buckley* v. *Valeo*, 424 U.S. at 138-39.

Management Officer" for the ABA Committee, who would "chair or attend each meeting of [the ABA] Committee" and who would be empowered "to adjourn any such 'meeting' in the public interest." 5 U.S.C. App. II § 10(e)-(f).

- Section 8 of the Act also would require the Advisory Committee Management Officer to assemble and maintain the reports and records of the ABA Committee and to release those reports to the public under the Freedom of Information Act. *Id.* § 8.[38]

- Section 5(a) would require the Judiciary Committees of the House and the Senate to delve, virtually without restriction, into the operations of the ABA Committee, pursuant to their authority to "review" advisory committee activities and functions.

- Section 7 of the Act would mandate that the Administrator of General Services review the activities of the ABA Committee each year, regardless of whether the President desires that GSA do so. *Id.* § 7(b).[39]

- Section 9 would bar the Committee from meeting or taking any other action until an advisory committee charter is filed with GSA, DOJ, and the House and Senate Judiciary Committees. *Id.* § 9(c).

---

[38] Thus, even if—as appellants suggest (Public Citizen Br. 35-37)—exemptions available under FACA (§ 10) could be interposed to prevent the most confidential ABA Committee information and documents from being released *to the public*, such information and documents would have to be released to the DOJ "management officer." Moreover, the decision whether or not to raise (or even litigate) any particular exemption would be in the hands of the Justice Department and not the ABA. This fact alone would severely hamper the ABA Committee's information-gathering process.

[39] While the Act delegates this authority to OMB, the General Services Administration is responsible for the Act's administration. *See* Exec. Order No. 12,024, 42 Fed. Reg. 61,445 (1977).

- Section 6(c) of the Act would require the President to make an annual report to Congress on his use of the ABA Committee. *Id.* § 6(c).

While the intrusive regulatory scheme outlined above would have a substantial impact on the necessarily confidential processes of the ABA Commmittee (and thus, on the President's process of nominating federal judges), even more significant interference would result from the potential application of the "public inspection" provisions of Section 10 of the Act. See *supra*, 5. As the district court noted, the ABA Committee's "evaluations of candidates are an integral and important part of the nomination process." J.S. App. 10a. The ABA's investigation of the professionai qualifications of prospective nominees to the federal bench is a delicate function and involves confidential interviews with attorneys, judges and law professors in the nominee's community. See J.S. App. 6a, *quoting WLF I*, 648 F. Supp. at 1355. Confidentiality in the process of the ABA Committee's evaluation of prospective judicial nominees is essential to ensure free and honest expression and to the Committee's exercise of its right to freedom of association.[40]

Moreover, "[t]he hallmark of the ABA Committee's relationship with DOJ and its evaluative process is confidentiality." J.S. App. 21a. There is, of course, a "valid need for protection of communications between high government officials and those who advise and assist them

---

[40] *See Mosk* v. *Superior Court*, 25 Cal.3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979). Confidentiality encourages participation in the evaluation process, protects participants from retribution or harassment and maximizes candor. *See People ex rel. Illinois Judicial Inquiry Bd.* v. *Hartel*, 72 Ill.2d 225, 380 N.E.2d 801 (1978), *cert. denied*, 440 U.S. 915 (1979); *In re Petition of Illinois Judicial Inquiry Bd.*, 128 Ill.App.3d 798, 471 N.E.2d 601 (1984); *Baumgarten* v. *Koch*, 97 Misc.2d 449, 411 N.Y.S.2d 487 (N.Y. 1978); *see also Information Acquisition Corp.* v. *Department of Justice*, 3 GDS ¶¶ 83,149, 83,782-83 (denying disclosure under FOIA of documents collected by FBI on nominee to federal bench because of "strong public interest in candid and thorough investigations of presidential appointments").

in the performance of their manifold duties." *United States* v. *Nixon*, 418 U.S. 683, 705 (1974).[41] Application of FACA to the ABA Committee, and the consequent loss of confidentiality, would seriously jeopardize the ability of the ABA to continue to provide the President with thoroughly considered and candid evaluations of the qualifications of prospective nominees and thereby impair the President's authority under the Appointments Clause.

3. Appellant Public Citizen relies on the fact that the President or the head of an agency may invoke the exemptions of FOIA or the Sunshine Act—where they are applicable—to preserve the confidentiality of ABA Committee meetings or documents. See *supra*, 16.[42] Thus, Public Citizen contends that only "threshold requirements" of FACA need be applied to the ABA Committee's operations. Public Citizen Br. 9; see *supra*, 16 n.12. Appellant WLF also places substantial reliance on the possible use of "exemptions" to suggest that application of FACA would have little or no effect on the ABA Committee's operations. WLF Br. 28 & n.16, 40-41.

The district court resoundingly and correctly rejected the suggestion of appellants that it was "premature" to address the constitutional issues until it could be determined what exemptions were available to the ABA Committee:

> Plaintiffs cannot have it both ways. Plaintiff WLF specifically requests as relief that this Court declare that "all" of FACA's requirements apply to the ABA Committee. Public Citizen's complaint requests

---

[41] Of course, a thorough pre-nomination investigation serves the important function of sparing the President any embarrassment associated with having his nominee rejected by the Senate. *The Federalist* No. 76.

[42] Even appellants do not suggest that the same degree of "confidentiality" could be maintained under FACA as presently exists. While the exemptions cited by appellants might prevent the release of some ABA Committee information and documents to the general public, the Committee's confidential workings would be laid bare to Congress and to the Executive Branch.

> broadly that DOJ be ordered "to comply with FACA's requirements." Although it may be strategically wise to suggest that this Court need not concern itself with the implications of actually applying FACA to the ABA Committee, it is disingenuous to argue that this Court is somehow "not confronted with a concrete case involving the specific application of any of FACA's provisions." It must be presumed that plaintiffs mean what they say in requesting that FACA's few basic requirements be applied to the ABA Committee.

J.S. App. 23a. Appellants are still trying to have it both ways. Either there will be no "concrete" effect (*i.e.*, no disclosure of confidential information that appellants are seeking)—in which case appellants lack standing (see *supra*, 15-17)—or application of FACA will have an adverse impact on the confidentiality of the ABA Committee's review process and, therefore, will infringe the President's ability to rely on the ABA Committee in performing the judicial selection function.[43]

Disclosure and public access are the rule under FACA; the exemptions generally are construed narrowly. See *Nader* v. *Dunlop*, 370 F. Supp. 177, 179 (D.D.C. 1973); *Gates* v. *Schlesinger*, 366 F. Supp. 797, 799 (D.D.C. 1973) ("Congress has expressly determined in the Federal Advisory Committee Act that Advisory Committee reports and functions are *not* generally confidential").[44]

---

[43] The brief of WLF, the original plaintiff, states that the "beneficiaries" of laws such as FACA are those "organizations who wish to obtain certain advisory committee documents or attend certain advisory committee meetings, subject to the exemptions from disclosure provided by both FOIA and the Sunshine Act." WLF Br. 4; *see id.* at 23 ("Congress did not intend to exempt personnel matters from the purview of the Act.").

[44] Even if the Department of Justice were authorized, as a general matter, to close the meetings of the ABA Committee, the Department would be required to provide a detailed analysis of the basis for closing the meeting and would also bear the burden of showing that *all* portions of the meeting should be closed. *See Nader* v. *Dunlop*, 370 F. Supp. at 179.

In fact, the Government-in-the Sunshine-Act has *no* deliberative process privilege under which ABA Committee meetings could be closed. See H.R. Rep. No. 1441, 94th Cong., 2d Sess. 25-26, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2244, 2262 (amending FACA to eliminate use of FOIA exemption for internal agency deliberations to close meetings); *Center for Auto Safety* v. *Department Of Justice*, 576 F. Supp. 739, 748 (D.D.C. 1983); Cf. 5 U.S.C. § 552b(c) (FOIA deliberative process privilege).

At bottom, there can be no question that application of FACA will impair the sensitive and necessarily confidential process of gathering information to assess accurately the qualifications and character of prospective judicial nominees. More important, application of FACA will adversely affect the ABA Committee's ability adequately to serve its function of assisting the President in the process of nominating candidates for the federal judiciary. Because the nominating authority is a job assigned exclusively to the President, the President's use of the ABA Committee cannot be undermined by an Act of Congress. Accordingly, this Court must find that the application of FACA to the ABA Committee impermissibly interferes with the President's sole discretion to nominate federal judges and is therefore unconstitutional.[45]

---

[45] While the district court correctly held that the application of FACA to the ABA Committee violates the principle of separation of powers, it is not necessary for this Court to reach the issue of whether this congressional intrusion is justified under *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), because FACA as applied clearly contravenes Article II, Section 2 of the Constitution.

IV. APPLICATION OF FACA IN THIS CASE WOULD VIOLATE THE FIRST AMENDMENT.

A. Application Of FACA Would Give Rise To A Direct Infringement Of Rights To Freedom Of Association And Expression.

1. The First Amendment plainly protects the right of association of ABA members. Courts and commentators have long recognized that "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association." *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958).[46] Indeed, in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), this Court noted that the First Amendment freedom to speak "could not be vigorously protected from interferences by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* at 622. Therefore, implicit in the right to engage in protected First Amendment activities is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.*; see *Board of Directors of Rotary Club Int'l* v. *Rotary Club of Duarte*, 107 S.Ct. 1940, 1947 (1987).

A statute infringes upon this freedom to engage in group effort when it tries to interfere with the internal structure or affairs of the group, *Cousins* v. *Wigoda*, 419 U.S. 477, 487-88 (1975), or when it attempts to require disclosure of a group's inner workings, *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982). This Court in *Roberts* stated:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express

---

[46] *See generally* Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964).

> only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Id. at 623, *citing Abood* v. *Detroit Board of Educ.*, 431 U.S. 209, 234-35 (1977).

In addition to freedom of association, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). The free discussion at issue here has two related, but distinct, aspects. First, the ABA Committee members have a clear right, as a group of private citizens, to gather information and confer among themselves and with members of their profession and communities concerning governmental affairs. Second, the ABA Committee and its members have the further, independent right to communicate with representatives of the federal government concerning these same issues. See *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

2. Application of FACA to the ABA Committee would violate these First Amendment interests by inserting the Government into the ABA Committee's consideration and evaluation of prospective nominees to the federal bench. Even accepting *arguendo* appellants' assumption that FOIA and Sunshine Act exemptions would generally protect the ABA Committee's most sensitive conversations and documents from public scrutiny, there is no question that application of the Act would affect the group's "internal structure" (*e.g.*, by interposing a government "Management Officer" in all meetings and correspondence) and mandate disclosure of the Committee's "inner workings" (at *least* to Congress and the Executive Branch). See *Dun & Bradstreet* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 759 n.5 (1985); *Mills* v. *Alabama*, 384 U.S. at 214. See also J.S. App. 21a.

Such governmental intrusion under FACA would plainly affect the way Committee members associate and

communicate within their intentionally limited and select group. This intrusion even threatens to permit a government official to shape the content of the views of the ABA Committee; indeed, if it chose to do so, the federal government has authority under FACA to adjourn Committee meetings as soon as undesirable views are expressed. 5 U.S.C. App. II § 10(e). Such direct and substantial interference with the rights of association and expression of a private group is virtually without precedent.

Application of FACA to the ABA Committee also would destroy the confidentiality of the Committee's evaluation process and therby chill speech on matters of public concern. A principal purpose of WLF's complaint in this case was to compel disclosure of the statements of persons interviewed by Committee members on a confidential basis. See, e.g., J.A. 6, 8, 10, 15-16. The obvious concern over embarrassment—or even reprisals—against those who express views on prospective nominees (see *Brown* v. *Socialist Workers*, 459 U.S. at 91-93) certainly will chill the free and full expression of opinion on prospective nominees. See *supra*, 36.[47]

---

[47] *See, e.g., In re Petition of Illinois Judicial Inquiry Bd.*, 128 Ill. App.3d 798, 804, 471 N.E.2d 601, 604 (1984) ("An attorney would understandably be reluctant to publicly denounce the qualifications of a judge he must later practice before"). The courts have long recognized the special sensitivity and need for confidentiality that exist when evaluations of individuals are involved. *See, e.g., Mosk* v. *Superior Court*, 25 Cal.3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979); *EEOC* v. *University of Notre Dame*, 715 F.2d 331 (7th Cir. 1983) (faculty tenure review); *Zaustinsky* v. *University of California*, 96 F.R.D. 622 (N.D. Cal. 1983) (faculty tenure review); *Bredice* v. *Doctors Hospital, Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1971) (medical review committee).

While appellants have speculated that information concerning potential judicial nominees gathered and discussed by the ABA Committee might not be publicly disclosed if the Government invoked privacy exemptions under FACA or FOIA, the lack of certainty on this point would, at a minimum, chill expressions of candid views concerning potential judicial nominees.

3. Appellants raise several arguments in an effort to avoid the conclusion that application of FACA to the activities of the ABA Committee would infringe the ABA's First Amendment rights.[48] First, WLF argues that in "examining the permissible level of government regulation of the operation of private organizations, the Supreme Court considers to what degree the private organization is 'private.'" WLF Br. 43. WLF thus appears to suggest that the level of judicial scrutiny of infringement of First Amendment rights may be lowered if a private association has some ill-defined "public" characteristics.[49] In a related argument, Public Citizen

---

[48] As a threshold matter, appellants contend that the Court should resolve this case without even considering the First Amendment issues because the court below did not have an opportunity to consider those issues. WLF Br. 43; Public Citizen Br. 42. Appellants' argument is meritless. This Court has made clear that a lower court judgment should be affirmed on any available grounds—even those not relied upon by the court below. *See, e.g., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697-98 (1984); *J.E. Riley Investment Co.* v. *Commissioner of Internal Revenue*, 311 U.S. 55, 59 (1940). Moreover, the district court did, in fact, have an opportunity to consider the ABA's First Amendment argument in resolving WLF's suit against the ABA. *See WLF I*, 648 F. Supp. at 1356.

Finally, it is well established that this Court can and will address a purely legal issue where to do so would serve the ends of justice. *See, e.g., Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941). Neither WLF nor Public Citizen has identified any disputed facts relevant to the First Amendment issue and the record before this Court plainly is sufficient to resolve the First Amendment issue as a matter of law. *See Donovan* v. *Crisostomo*, 689 F.2d 869, 874 (9th Cir. 1982); *National Treasury Employees Union* v. *Reagan*, 663 F.2d 239, 250 (D.C. Cir. 1981); *Federal Election Commission* v. *Lance*, 617 F.2d 365, 374 (5th Cir. 1980).

[49] WLF relies on *Roberts* v. *United States Jaycees*, but *Roberts* provides no support for WLF because this Court clearly applied the "compelling state interest/narrowly drawn" tests without modification in that case. 468 U.S. at 623. Indeed, the suggestion that First Amendment rights diminish along a spectrum moving from "private" to "public" organizations ignores the fact that strict scrutiny may be applied to conduct infringing the First Amendment rights of government employees. *See, e.g., Clark* v.

also suggests that there is no infringement of First Amendment rights because the case involves an instance in which a private association is being "treated more favorably by the government than other members of the public." [50] Public Citizen Br. 43-44. But it is contrary both to existing law and logic to suggest that a private

---

Library of Congress, 750 F.2d 89, 94 (D.C. Cir. 1984) (impairment of First Amendment rights of governmental employees justified only by "exacting scrutiny" of government purposes beyond "mere legitimate state interest" and of government means that are "least restrictive of freedom of belief and association"). *See also Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

In *Rouse* v. *Judges of Circuit Court*, 609 F. Supp. 243 (N.D. Ill. 1985), also relied upon by WLF, no First Amendment questions were raised or decided. But, the case is instructive: in *Rouse*, the court found "state action" under 42 U.S.C. § 1983 only when the Bar Association actually *made decisions* for the Circuit Court. The court specifically found no "state action" when the Bar Association merely evaluated or commented on judicial candidates. 609 F. Supp. at 246-47. WLF does not allege—nor could it—that the ABA *makes decisions* for the President about who shall be nominated to the federal judiciary. Thus—assuming that WLF's contorted analogy between FACA and § 1983 is useful—the ABA Committee is *not* functioning as a "government" or "public" entity.

[50] The only case cited by Public Citizen to support this proposition is *Center for Auto Safety* v. *Cox*, 580 F.2d 689 (D.C. Cir. 1978). However, the facts in *Cox* are distinguishable from those here. *Cox* involved an organization, the American Association of State Highway and Transportation Officials ("AASHTO"), which received federal funds and was comprised of government officials, *including* officials of the United States Department of Transportation—the very agency which AASHTO was advising. Thus, in *Cox*, unlike this case, federal government officials were already participating in AASHTO's deliberations. Accordingly, in contrast to this case, no issue of interference with associational rights was or could have been raised in *Cox*. This distinction belies Public Citizen's claim that the restrictions involved in this case are less onerous than those in *Cox*. Public Citizen Br. 44-45. To the contrary, Public Citizen's arguments ignore the substantial infringement on freedom of association that would be entailed in this case—an infringement not even considered in *Cox*.

organization's First Amendment rights are somehow diminished if the government regularly chooses to listen to its views.

Second, Public Citizen argues that "FACA's provisions do not impose any obligations on independent organizations like the ABA" but rather are simply "directed at the government itself." Public Citizen Br. 43. This argument is disingenuous. The fact that the government "enforces" FACA (like any other statute) does not minimize the demonstrated direct intrusions *on the associational rights of a private committee* that a court-ordered and Justice Department-implemented application of FACA necessarily entails. Obviously, when a private association's very ability to meet as a group to discuss public matters is controlled by a federal government employee (see 5 U.S.C. App. II § 10(e)-(f)), it is absurd to claim, as Public Citizen does, that to apply FACA as appellants urge would not impose any burden on a private organization.

Finally, Public Citizen presents a hypothetical which it claims "helps place the ABA Committee's First Amendment argument in context." Public Citizen Br. 44. Public Citizen asserts that this case involves precisely the same issue as would be raised by a case in which the Government refused to listen to the ABA's views unless the ABA adhered to FACA's requirements. *Id.* The issue raised by Public Citizen's hypothetical—whether the ABA would have a First Amendment right to insist that the Government listen to its views without complying with FACA—is plainly distinct from the issue raised by this case.[51]

---

[51] This Court has held that cases in which the government's obligation to listen is at issue are not the same as cases—such as this one—involving a party's right to associate for the purpose of addressing "willing listeners." *Minnesota Bd. for Community Colleges* v. *Knight*, 465 U.S. 271, 288-89 n.10 (1984). The First Amendment issue here parallels the one advanced in *Healy* v. *James*, 408 U.S. 169 (1972). There a state university denied a student group access to university facilities to communicate with

This Court need not resolve what the law would be if the ABA Committee were just another group that tries to influence government action. The fact is that the ABA first started giving its views to the Executive Branch in advance of nomination some three and a half decades ago because President Eisenhower and Attorney General Brownell requested it. The arrangement began not at the instance of the ABA, but the Executive Branch. And the process has continued since that time because of the Executive Branch's continuing desire to have the ABA's views in advance of nomination. Obviously, Article II empowers the Executive Branch to seek the views from whomever the President chooses in exercising the appointment power, and that is exactly what has happened in this case. The price to the ABA for responding to a governmental request for information that the ABA is uniquely qualified to supply cannot be the forfeiture of its First Amendment rights of association and speech.

B. The Governmental Interests Served By FACA Cannot Justify The Substantial Infringement Of First Amendment Rights That Would Result From Application Of The Act To The ABA Committee.

To survive judicial scrutiny, a statute directly infringing First Amendment rights of freedom of association and expression—as appellants would apply FACA—must (1) be intended to achieve a compelling governmental interest, *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963); *and* (2) be narrowly drawn to vindicate that interest, *Bellotti*, 435 U.S. at 793-95; *Button*, 371 U.S. at

---

willing listeners. This Court rejected the argument that this exclusion did not impair First Amendment rights because the student group remained free to associate in order to advocate its views off-campus (*id.* at 183):

> the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities.

435-38. *Both* of these requirements must be met for an infringing governmental action to be upheld. But FACA, as broadly interpreted by the appellants, satisfies neither of these standards.

Here appellants cannot show any compelling government interest that would even colorably justify application of FACA to the ABA Committee. Congress has no legitimate interest in restricting or shaping the flow of information and views from private groups to the Executive which are vital to the President's exercise of exclusive authority under Article II. Indeed, the Government has not defended the proposed abridgement of the First Amendment rights of the ABA Committee and its members. Instead, in this case two private organizations seek to abridge another private organization's constitutional rights, through an unprecedented application of FACA, even though no evidence indicates that Congress ever intended the Act to be so applied.

WLF asserts in conclusory fashion that any infringement of the ABA's First Amendment rights is justified by Congress' "concern with the need to open up the advisory committee process." WLF Br. 44. This assertion falls far short of passing constitutional muster. WLF has not provided any evidence that Congress identified a national problem with the role of private associations in the presidential nominating process that would justify significant governmental intrusion into the deliberations and operations of such private groups.[52] Obviously, WLF has not—and cannot—cite such a clear statement of com-

---

[52] *Cf. Federal Election Comm'n* v. *Machinists Non-Partisian Political League*, 655 F.2d 380, 392 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981) (discussing careful scrutiny of congressional purpose this Court accorded phrase "political committee" in Federal Election Campaign Act due to First Amendment implications). In fact, problems with openness and public accountability in the presidential appointment process are unlikely. All groups have notice when vacancies exist, and are thus free to suggest nominees to the President. And all groups are free to engage in debate about the nominee when the Senate exercises its confirmation function.

pelling interest from a statute which has been described as "obscure, imprecise, and open to interpretations so broad" that litigants "may try to press statutory claims beyond constitutional boundaries." *National Anti-Hunger Coalition* v. *Executive Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. at 530. The complete congressional silence in FACA's legislative history on so fundamental and complex a question as a private association's First Amendment right to participate effectively in the process of nominating presidential appointees cannot constitute the compelling interest required by the First Amendment.

Indeed, as discussed *supra*, 21-22, the legislative history and, in particular, the conference report underlying FACA demonstrate that Congress intended the Act to apply only to advisory committees created *by* or *for* the government, and not to independent, private organizations from which the Executive Branch seeks advice concerning Presidential appointments. The potential for infringement of the First Amendment rights of private organizations caused by an overly broad application of FACA readily can be eliminated if the scope of the Act is limited as Congress intended.

Finally, FACA, particularly as appellants would apply it, could not be characterized as "narrowly drawn" to vindicate a legitimate government interest. A desire that government officials communicate openly with the public is plainly not sufficient to justify the Government's intrusion into the speech and associational rights of a private group under the broad and vague provisions of FACA. Any legitimate interest in open communications can readily be satisfied by less restrictive means—*i.e.*, by regulating the conduct of government officials and by specifying the communications directly to them that *they* must place in the public record.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

DARRYL L. DEPRIEST
General Counsel
American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5215

REX E. LEE *
RONALD S. FLAGG
CARTER G. PHILLIPS
MARK D. HOPSON
MICHAEL D. WARDEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

H. BLAIR WHITE
DAVID T. PRITIKIN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for American Bar Association

* Counsel of Record

March 11, 1989